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SUPREME COURT, U.S.

NO. 80-6948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JONATHAN BRUCE REED,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF TEXAS

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The appellant, by and through his counsel in this cause, opposes the Motion to Dismiss or Affirm filed by the Appellee.

Appellee has made three distinct arguments in support of its Motion to Dismiss the appeal. First, the Appellee claims that review of this case by the Court will prove offensive to notions of federalism. Second, Appellee contends that Appellant has failed to exhaust appropriate state remedies before bringing his appeal to this Court. Third, Appellee asserts that an appropriate remedy already exists in the potential for federal habeas corpus in the district court. Appellant offers brief response to these three points raised by Appellee's Motion.

First, Appellee argues that exercise of this Court's appellate jurisdiction in this cause will require the Court to sit as a "super legislature," offending "traditional notions of comity and federalism." Texas hopes to influence the Court by recounting the timely process characterizing adoption and application of the "exclusionary rule" to state criminal prosecutions. The rule of exclusion, however, uniquely involves a judicially created remedy for enforcement of Fourth Amendment rights and itself implies no discussion of the substantive rights of an

accused. In contrast, Appellant has raised issues of substantive rights arising under the Double Jeopardy Clause and while the focus of his complaint is procedural inadequacies in Texas law, the underlying concern is for protection of his substantive rights. The Court has previously recognized the fact that Double Jeopardy Clause issues arising in state prosecutions may be proper subjects for consideration by the Court. Illinois v. Vitale, ___US___ (1980); Harris v. Washington, 404 US 55 (1971); Price v. Georgia, 398 US 323 (1970). Appellee offers no compelling reason why the Court should limit its consideration of matters arising under the Constitution simply because the issues are raised in the context of state prosecutions.

Second, the Appellee argues that Appellant has failed to exhaust appropriate state remedies prior to seeking review in this Court. Appellee asserts that "application for writ of mandamus or prohibition might well be the appropriate means."

This assertion is completely contrary to the express holding of the Texas Court of Criminal Appeals in Ex parte Huffhines, Nos. 60, 749, 60, 750, and 60, 751 (Tex. Crim. App., Oct. 10, 1979), attached to Appellant's Jurisdictional statement as Appendix 6. In Huffhines the court specifically reviewed Abney v. United States, 431 U.S. 651 (1977), and held that although the Supreme Court's ruling in Abney was compelling and appropriate,

> From the beginning, however, the settled practice in this State has been and is that jeopardy is a special plea to be made by an accused in advance of trial and tried by the trier of facts on the trial on the merits, Articles 27.02, 27.05 and 27.07, V.A.C.C.P.

Ex parte Huffhines, supra, see Appendix 6-7 to Appellant's Jurisdictional Statement. The Court of Criminal Appeals, thus, emphatically directed criminal defendants to rely only upon the statutory procedural mechanisms for assertion of double jeopardy claims. These are the very same statutory mechanisms which Appellant has attacked in his jurisdictional statement. Appellee's reliance on Huffhines is both unfounded and improper.

Further, Appellee merely suggests in the Motion to Dismiss or Affirm that other remedies may be appropriate, but conspicuously fails to list any extraordinary relief that would be

available in this cause and fails to cite any case law in support of the proposition. In contrast, the Fifth Circuit Court of Appeals, after reviewing this very question, has concluded that no such remedy exists in the State of Texas and that habeas corpus was the proper mechanism to raise the issue and the double jeopardy claim. Baker v. Metcalfe, 633 F2d 1198, 1200 at n.3, (5th cir. 1981). In Baker v. Metcalfe the petitioner had moved in the Court of Criminal Appeals of the State of Texas for leave to file a Writ of Habeas Corpus, exactly as Appellant has done in the instant case. Leave to file was denied, just as in the instant case. Both the District Court for the Northern District of Texas and the Fifth Circuit concluded that petitioner had properly placed his contentions before the Texas appellate court and had exhausted the state remedies. See Baker v. Metcalfe, 489 F. Supp. 930, 930 (N. D. Texas 1980), and Baker v. Metcalfe, supra at 1199 (5th Cir. 1981).

Finally, Appellee contends that if an appropriate state remedy is not available, Appellant should be required to file for habeas relief in the district court, citing Baker v. Metcalfe. In taking this position, Appellee virtually abandons its concerns with "comity" and "federalism." Further, the inadequacy of Texas procedure requires the district court to apply state law, substantively, to the jeopardy issues raised by such applications for relief. This position runs counter, in fact, to the traditional wisdom that state courts should ultimately interpret state law. Garner v. Louisiana, 368 US 157 (1961). Appellant advances the argument that adequate procedural remedies for assertion of double jeopardy claims must exist on the state level if the goals of due process and judicial economy are to be served.

The Court should note probable jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM has been served upon all parties entitled to be served by the Rules of the Supreme Court. The following parties have been served by depositing the documents in a United States post office mailbox, with first-class postage pre-paid and addressed as follows:
On this 23 day of September, 1981.

The Hon. Mark White
Attorney General for the State of Texas
P.O. Box 12548
Austin, Texas 78711

The Hon. James K. Allen
Judge, Criminal District Court No. 5
Dallas County Courthouse
Dallas, Texas 75202

The Hon. Henry Wade
District Attorney for Dallas County, Texas
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